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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 107

REX CARPENTER, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Pennsylvania denying petitioner's motion to dismiss (Pet. App. 38) is reported at 137 F. Supp. 517, and its opinion granting the motion of the United States for summary judgment (Pet. App. 31) is reported at 147 F. Supp. 768. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 22) is reported at 251 F. 2d 775.

JURISDICTION

The judgment of the Court of Appeals was entered January 30, 1958 (Pet. App. 22). A timely motion for rehearing was filed on February 12, 1958, and denied on

February 21, 1958. The time for filing the petition for a writ of certiorari was extended by order of Mr. Justice Brennan, dated May 20, 1958, to June 16, 1958. The petition for a writ of certiorari was filed on June 13, 1958.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a letter of October 29, 1946, from the Office of Defense Supplies to petitioner, advising him that certain of his meat subsidy claims "have been declared invalid" constituted a final administrative order of invalidation which, in the absence of a timely protest, was a binding determination of petitioner's liability to refund payments which had been made to him pursuant to these claims.

2. Whether petitioner was deprived of his property without due process of law in violation of the Fifth Amendment by (a) the failure of an administrative order invalidating petitioner's subsidy claims to advise him of his statutory right to seek review of the order, or (b) the failure of the United States to bring suit to enforce this order until some eight years after the last correspondence between petitioner and the agency relating to these claims.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and regulations are set out in the appendix to this brief, *infra*, pp. 11-14.

STATEMENT

This action was brought by the United States to recapture meat subsidy payments in the amount of $34,593.43, which were made to petitioner in 1944, 1945 and

1946, as part of the Government's livestock slaughter program, and which were subsequently invalidated by the Defense Supplies Corporation, the subsidy-paying agency, because the claims were not sufficiently supported by the slaughterer's records (Pet. App. 22-23).[1] The letter of invalidation read as follows (Pet. 5):

OFFICE OF DEFENSE SUPPLIES

October 29, 1946

Mr. Rex Carpenter
Townville, Pennsylvania

Re: Meat Subsidy

DEAR SIR:

In accordance with instructions from our Washington Office, this is to advise that all of your DS-T-55 claims through February 1946, have been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims as per the attached T-608 adjustment sheets. This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims.

You are given the alternative of either withdrawing these claims by return of the amounts paid thereon, together with interest at 4% per annum, or, supporting them at your own expense by the

[1] Section 7003.4 of Defense Supplies Corporation Regulation No. 3 (8 F.R. 10826) and Section 7003.4 of Revised Regulation No. 3 (10 F.R. 4241) required that records supporting the subsidy claims be preserved for inspection, and that upon failure of compliance the administrative agency would have the right to invalidate the claims for the affected reporting periods.

work of Independent Accountants approved by the Chief Auditor and working under our supervision.

You are further advised that all other claims through February, 1946 have been challenged because of insufficient records and that you will be informed later as to what, if any, corrective action will be necessary to clear these claims.

Please let us hear from you immediately regarding your intentions and should you decide to support these claims through the work of an independent accountant, we suggest you contact this Agency regarding the various requirements prior to making any definite arrangements.

Very truly yours,

W. R. CLAY,
Examiner.

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Petitioner made no attempt to contest or appeal from this determination of invalidity nor did he undertake to support the claims by an independent audit under the agency's supervision. Following some inconclusive correspondence between petitioner and the agency (Pet. App. 28-29), petitioner on January 8, 1948, was advised by the office of Defense Supplies that, "[n]ot having heard from you in response to our various requests for settlement of your indebtedness totalling $34,593.43, plus accrued interest, this is to notify you that the case is being forwarded to our Washington office with the recommendation that the same be referred to the Department of Justice" (Pet. App. 25).

The United States on August 29, 1955, instituted this collection action for the amount of the invalid subsidies,

together with interest (Pet. App. 22). The District Court awarded summary judgment to the Government (Pet. App. 31-37), holding that the agency letter of October 29, 1946, was a final order of invalidation of petitioner's subsidy claims, and that since such orders are reviewable only by the Emergency Court of Appeals, its validity could not be challenged in an enforcement proceeding (Pet. App. 36). On appeal, the Court of Appeals for the Third Circuit, in an opinion by Circuit Judge Maris, affirmed the District Court's decision (Pet. App. 22-30). The court held (Pet. App. 26) that the letter of October 29, 1946, was "a binding determination" of petitioner's liability to refund the invalidated subsidy payments. Rejecting petitioner's contention that the letter was deprived of its finality because it gave him the alternative of making restitution or of verifying his figures by an independent audit, the court held that the effect of this alternative "was merely to give [petitioner] an opportunity to seek reconsideration of the order of invalidation" (Pet. App. 26). The court held that the letter-order in this case was thus clearly distinguishable from those involved in *Riverview Packing Co.* v. *Reconstruction Finance Corporation*, 207 F. 2d 415 (E.C.A.), which in the circumstances of that case were held not to constitute final orders of invalidation, and concluded that petitioner's failure to seek appropriate review of the letter of October 29, 1946, barred him from contesting on the merits the Government's right to collect these moneys (Pet. App. 28).

ARGUMENT

1. The decision below was clearly correct in holding that the agency letter of October 29, 1946, was a definite and final order of invalidation. It is well settled that

orders invalidating subsidy claims need not "follow any particular technical form," *United States* v. *Bass*, 215 F. 2d 9, 13 (C.A. 8), but that such determinations "even though informally expressed, are orders issued under section 2(e) of the Emergency Price Control Act." *Riverview Packing Co.* v. *Reconstruction Finance Corporation*, 207 F. 2d 361, 366 (C.A. 3). Thus, the courts have consistently held that agency letters constitute such final orders whenever they make clear that the subsidy claims had in fact been invalidated. See, *e.g.*, *United States* v. *Bass*, *supra*; *Silver Pine Oil Co.* v. *Reconstruction Finance Corporation*, 205 F. 2d 835 (E.C.A.); *Merchants Packing Co.* v. *Reconstruction Finance Corporation*, 176 F. 2d 908, 912 (E.C.A.); *Armour & Co.* v. *Reconstruction Finance Corporation*, 162 F. 2d 918, 923 (E.C.A.); *United States* v. *Tambasco*, 144 F. Supp. 729, 731 (N.D. N.Y.); *United States* v. *Trenton Packing Co.*, 133 F. Supp. 69 (D. N.J.); *United States* v. *Luer Packing Co.*, 110 F. Supp. 792 (S.D. Calif.).

The letter in this case unequivocally informed petitioner of the invalidation of his claims. It flatly advised him that "all of your DS-T-55 claims through February 1946, have been declared invalid and that a claim receivable in the amount of $34,593.43 has been entered against these claims as per the attached T-608 adjustment sheets." By way of explanation, the letter continued: "This is occasioned by the fact that a recent field examination disclosed that your records did not sufficiently support the live weights, cost and dressed weights by grades as reported in these claims." As both courts below held, this letter-order was clearly sufficient as a notification to petitioner both of the invalidation of his claims and the reasons for such invalidation.

Nor was the letter-order deprived of its finality by the fact that, after expressly invalidating petitioner's claims, it went on to offer him the alternative of making restitution or verifying his figures by an independent audit. The court below properly held that this language in no way affected the finality of the order of invalidation, but merely gave petitioner an opportunity to seek reconsideration of that order. Since he failed to take advantage of this opportunity, "the order of invalidation stood" (Pet. App. 27).

Contrary to petitioner's contention, there is no conflict between the decision below and the holding of the Emergency Court of Appeals in *Riverview Packing Co.* v. *Reconstruction Finance Corporation*, 207 F. 2d 415. Judge Maris, who also wrote the *Riverview* opinion in his capacity as Chief Judge of the Emergency Court of Appeals, had no difficulty in distinguishing the two cases. He pointed out (Pet. App. 27) that neither of the two letters upon which the Government relied in *Riverview* in fact embodied orders invalidating the slaughterer's subsidy claims, and that a third and subsequent letter clearly showed that the agency was then still examining the validity of these subsidy claims.[2] In

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[2] Judge Maris summarized the *Riverview* case as follows (Pet. App. 27):

> In the Riverview Packing Co. case the Government relied upon two letters which it regarded as embodying reviewable orders invalidating the slaughterer's subsidy claims. The first letter, an intra-agency communication, merely described the procedure to be followed by the agency in notifying the slaughterer of the alternatives open to it. It was not an order to the slaughterer invalidating his subsidy claims. The slaughterer was notified by the Reconstruction Finance Corporation of the alternate courses open to it, namely, of withdrawing its claims and making restitution or of supporting the claims by an independent audit, and it adopted the second course and retained, with the approval of the agency, an

the present case, Judge Maris noted, petitioner did not choose the alternative of supporting his claims by an independent audit; on the contrary, after receiving the letter of invalidation, petitioner visited the agency examiner to deny the violation of any OPA regulation and to affirm the sufficiency and correctness of his records (Pet. App. 28). Accordingly, with respect both to the letters themselves and the factual circumstances, the author of the two opinions found *Riverview* and the present case "clearly distinguishable" (Pet. App. 27). We submit that Judge Maris was plainly correct in so holding, as well as in determining that the letter-order in this case constituted a definite and final order of invalidation.

2. There is no merit to petitioner's argument that the procedure followed by the Government in invalidating his claims and in bringing suit to enforce their repayment deprived him of his property without due process of law in violation of the Fifth Amendment to the Constitution. Petitioner complains specifically that his constitutional rights were violated by the failure of the agency to advise him of his right to protest its order of invalidation and by the fact that the United States

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accounting firm to make the audit. 207 F. 2d 415; 419. The Emergency Court of Appeals held that the letter thus granting alternative courses, together with the fact that the slaughterer had accepted the second alternative which left something more for the agency to do, namely, to accept or reject the independent audit, prevented the letter from constituting a final order of invalidation. The court found the second letter to be one of advice as to future action with respect to the claims and not a definite and final invalidation. Furthermore a third letter clearly showed that the agency was then still conducting an examination of all of the subsidy claims including those which it alleged had been finally invalidated. Under those circumstances the court determined that no final reviewable order remained for it to consider.

did not bring its collection suit until some eight years after the last correspondence between the parties (Pet. 3). Both contentions are plainly without substance.

a. The procedure for review of an agency order of invalidation is explicitly set forth in the Emergency Price Control Act itself. Section 203(a) of the Act, *infra*, p. 12, provides for the filing of a protest from such an order, and Section 204(a), *infra*, p. 12, provides for review by the Emergency Court of Appeals in the event the protest is denied. The constitutionality of these provisions as the exclusive method of reviewing such agency determinations has been sustained by this Court, *Yakus* v. *United States*, 321 U.S. 414, and there is no claim that they were not open to petitioner. Moreover, contrary to petitioner's contention, the agency had no obligation to advise him of the availability of such review. These remedies were spelled out in the statute, and, as part of the "terms and conditions" under which petitioner's subsidy claims had been paid, were binding upon him whether or not he had actual knowledge of them. Cf. *Federal Crop Ins. Co.* v. *Merrill*, 332 U.S. 380; *United States* v. *Zazove*, 334 U.S. 602.

b. Equally without merit is petitioner's complaint of undue delay by the United States in bringing this collection action. In the absence of a specific statutory provision, there is of course no time limitation upon suits by the United States; and Congress has not placed any limitation on actions to recover illegally paid subsidies. *United States* v. *Borin*, 209 F. 2d 145 (C.A. 5), certiorari denied, 348 U.S. 821. Suit on the claim against petitioner was instituted in the normal course of winding up the wartime subsidy program, and any delay

was due solely to the vast number of claims which the Government must process. In any event, petitioner's claim that he was injured because he disposed of his records prior to suit is obviously groundless. His obligation to repay the amount of the invalidated subsidies, as determined by the letter-order of October 29, 1946, could no longer be contested on the merits after December 15, 1950, the date set by Reconstruction Finance Corporation Regulation No. 11 (15 F.R. 6193) as the deadline for filing protests. Since petitioner was thus foreclosed from contesting the validity of the agency order in this collection action, it was immaterial whether or not he still retained his slaughter records concerning these claims.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY, 1958.

APPENDIX

1. The pertinent provisions of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App. (1946 ed.) 901, *et seq.*, are as follows:

> Section 2.(e) [50 U. S. C. App. (1946 ed.) 902(e)] Whenever the Administrator determines that the maximum necessary production of any commodity is not being obtained or may not be obtained during the ensuing year, he may, on behalf of the United States, without regard to the provisions of law requiring competitive bidding, buy or sell at public or private sale, or store or use, such commodity in such quantities and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof or otherwise to supply the demand therefor, or make subsidy payments to domestic producers of such commodity in such amounts and in such manner and upon such terms and conditions as he determines to be necessary to obtain the maximum necessary production thereof: *Provided*, That in the case of any commodity which has heretofore or may hereafter be defined as a strategic or critical material by the President pursuant to section 5d of the Reconstruction Finance Corporation Act, as amended, such determinations shall be made by the Federal Loan Administrator with the approval of the President, and, notwithstanding any other provision of this Act or of any existing law, such commodity may be bought or sold, or stored or used, and such subsidy payments to domestic producers thereof may be paid, only by corporations created or organized pursuant to such section 5d; * * *

Section 203.(a) [50 U. S. C. App. (1946 ed.) 923(a).] At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. * * *

Section 204: [50 U. S. C. App. (1946 ed.) 924]

(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation, order, or price schedule protested be enjoined or set aside in whole or in part. * * * Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. * * *

* * * * *

(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme

Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule or to restrain or enjoin the enforcement of any such provision.

2. Defense Supplies Corporation, Revised Regulation No. 3, effective January 19, 1945 (10 F.R. 4243), provides in pertinent part as follows:

§ 7003.9 * * * (c) * * * Payments will be made monthly upon preliminary approval of the claim.

* * * * *

§ 7003.10 * * * (a) * * * Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which does not meet

the requirements of this regulation, and any claim filed by an applicant who, in the judgment of the War Food Administrator or the Price Administrator, has wilfully violated any regulation of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat.

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